89-1808

Docket No.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JAMES WILSON, Petitioner

v.

SECURITY INSURANCE CO., Respondent

On Writ of Certiorari to the
Supreme Court of the State of Connecticut
(Docket 13618)

Part II of
Appendix to
Petition for Writ of Certiorari

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APPENDIX
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[Exerpts from transcript of proceedings in Superior Court before Meadow, J.

[Tr. 9]

MR. REILLY: Page twenty-eight has the scope of the review and I find it necessary to go into much greater detail for the reason that the arbitrators, I believe, sustained two grounds which we claim were --- for the establishment of liability on the part of the insured's company. Ground one was the definition of the declarations as to who was the insured. They define the words insured as the Town of Woodbridge, et al which means and others. A second ground was we were claiming under the facts that existed in this case my client was entitled to be covered as a matter of law because of the scope of the regulations [Tr. 10] and statutes of the State of Connecticut.

My client is a police officer. He had a lady who was in handcuffs under arrest and he was in the process of loading this lady into the automobile as loading is defined. I don't think we normally talk about loading people but when you place things in and out of automobiles and you use an automobile for that purpose it's normally required coverage. Finding number two of the arbitrators says that under the facts of this case Mr. Wilson was entitled to recover. The petition that is filed does not address the facts that was presented to the arbitrators. Our -- were wholly uncontested. There was a lady. She was in handcuffs. The police report was in evidence. the man who was with Mr. Wilson gave testimony before the arbitrators that they were talking this lady to Mr. Wilson's police car when there was an interruption by an outsider.

Mr. Wilson was compelled to deal temporarily to deal with the interruption. But the purpose of getting this lady into the vehicle and placing her into the vehicle is a loading aspect. Now under the regulations of the insurance commissioner Section 5 of the regulations specifically states that employees of the named insured must always be insured for loading operations under all circumstances [Tr. 11] for liability coverage. Now liability coverage and insurance for liability coverage becomes important because of the structure of the statutes and the statutes says, section 38, 175C.

MS. CORMIER: Excuse me, Your Honor. I think now he's getting into the merits of-- I think what we decided first would be appropriate review was whether the court could hear testimony now from people that obviously- the fact that they're testifying now means that-

THE COURT: I know. It seems to me that the certainly your issue is whether or not there was coverage.

MS. CORMIER: My is whether there was-

THE COURT: And you want me to interpret the application of an insurance policy.

MS. CORMIER: Based upon the findings made by the arbitrators in the decision. I don't think you have to go outside the record for that.

THE COURT: You don't think so?

MS. CORMIER: No I don't.

....

[Tr. 14]

MS. CORMIER: Your Honor, what I propose is very simple. I think that what Your Honor has in front of you is the record that I need for you to review the issues of law and that is the insurance policy which the arbitrators found in their find-

ings and award was the policy between the two parties. And then you have the finding award in the descent. The finding and the finding award contains the facts that they found plus stipulations by the parties. And that is sufficient record for Your Honor. That presents the factual background-

.....

[Tr. 15]

MS. CORMIER: Oh, Yes, Your Honor, and that's exactly what I'm asking you to review. What I'm trying to do is make a distinction between the findings of fact. What I'm saying is just because there was evidence before the arbitrators doesn't mean that the found something. ....

[Tr. 16] MS. CORMIER: Well, Your Honor, I think he is if he's- one thing he's trying to put before you- What he's

saying is that look it. There was evidence before the arbitrators that this happened and that happened and the fact that they may have been at this point. That's irrelevant. If the arbitrators didn't make findings of fact regarding the evidence you can't buy from the evidence to support and interpretation of the law. Because in essence you would be finding facts. You would be saying yes, I agree with Mr. Reilly's interpretation of the evidence before the arbitrators and, therefore, I support their interpretation because I find that their interpretation [Tr. 17] is based upon this evidence. But what I'm saying is that that goes beyond what your function can be at this level.

....

MS. CORMIER: Your Honor, I think that what he says in that brief is the-

THE COURT: The burden is on the person moving to vacate. All issues submitted for decision have been passed upon and resolved and the burden of proving otherwise is upon the party challenging the award. It seems here that he says that the presumption of all issues were to found for the Defendant.

MS. CORMIER: Your honor, -- I don't think there's any such presumption.

....

[Tr. 20] MR. REILLY: My claim is that all the facts that were disputed, are found in favor of Mr. Wilson, and they are not limited in what they say-- they do not say "on the facts of this accident, as we have recited them previously"-- they are talking about all the facts, that were before them. All the undisputed facts that were before them. Your Honor, the finding ought to be

tested in view of the claims of proof. Years ago we use to take appeals to the Supreme Court and we would test the jury verdict to see whether or not there was evidence before the jury verdict which is general, as to whether or not there were claims of proof to support the jury verdict.

The following concession as to the record before the arbitrators appears:

[Tr. 22] MS. CORMIER: I think that it was made explicit by the findings they made in the response by decent. My position would be that the issue was submitted to the arbitrators, there were two ways in which the plaintiff claimed to be covered under the policy. One was that he was the named insured, and one that he was using the [Tr. 23] vehicle-there were

no findings regarding his using the vehicle--the arbitrators made a specific finding that he was covered as a named insured. ....

[Tr. 27] MS. CORMIER: Your Honor, I don't think you can change their finding of fact as opposed to their conclusions of law. To say that there is coverage is a conclusion of law. What I think you can't do is to change their finding of fact which I think, altho Mr. Reilly says he agrees that there is no denovo (phonetic) trial and stuff, what he would like to do is put before all kinds of evidence before you and he said it was all undisputed and that's not true. What he's [Tr. 28] trying to say is that look at it, there was all this evidence--
THE COURT: The burden is on you, the burden is on you to present to this court

the basis for this court to vacate that decision.

MS. CORMIER: Your honor, I agree, what I am saying is that --

THE COURT: let's start there-- you have submitted to me, the application, the insurance policy, which was up there, and the two decision, the majority decision and the descenting decision--and you told the Court you rested on that.

MS. CORMIER: Yes your Honor, because in their findings of fact, if they haven't, if there is nothing before you that- if all they said was--

THE COURT: If that's what you present, that's what you present, that's the end of it. ....

[Tr. 30] MR. REILLY: .... Now I claim that there is a presumption-- that the arbitrators made all the findings necessary to support this conclusion. That on

the facts of this accident Mr. Wilson was entitled to coverage and there is no presumption that they didn't do something that is necessary to that conclusion. And there is no presumption that the facts they happen t refer to, are the only facts that they found. They didn't say that. It would be grossly unfair to have a situation presented to this Court, where it is totally undisputed before the arbitrators as to what the full scope of the facts were and because of the way in which they drafted language--and they come to the statement that on the facts of this accident, Mr. Wilson is entitled to recovery. The facts now going to be restricted in some fashion, there is no statement in that finding--that what they saying is to be restricted by what they said early. That would be grossly unfair to Mr. Wilson. The facts are undisputed that he was loading.

....

[Tr. 35] ...MR. REILLY: The argument I have already given you your Honor, is that there is no finding that Mr. was not loading. ....

MR. REILLY: I would like to put Mr. Wilson on--I have all the exhibits where were before the arbitrators. May I have Mr. Wilson put on the stand to testify tnat our claims prove they heard it all. They heard it all.

THE COURT: I am not going to re-hear. You're asking me to re-hear. They decided in your favor. She wants me to take it away. I am not going to re-hear what you have these people. I a may not be as explanatory based upon the facts, but I may arrive at the same conclusions. I am going to read the evidence.

MR. REILLY: That would be my claims of proof.

THE COURT: You already gave me your claims of proof, you gave me a brief. You also said that it is presumed that they took that into consideration. And [Tr. p. 36] you also submit that I shouldn't re-try the case. I am not going to re-try it.

Regarding claims as to the cost of coverage, Wilson made the following claim at trial:

[Tr. 47] MR. REILLY: Your Honor, I have this to say about it. The argument is pure speculation and it is not based on facts proven to the arbitrators. She talks about the cost of premiums for insurance. Insurance is something that is sold to millions and millions of customers. And they spread the risk. And the object is to make it so [Tr. 48] cheap that everybody wants to buy it.

Because you can take something that is unreasonably expensive such as a million dollars like she--and sell it for a reasonable premium. What's wrong with that? That's the whole object of selling insurance, sell it cheap, the cheaper the better-now everybody wants to buy it. Now they way this is so cheap it's too expensive, for them. But they don't put on any proof of that. ....

Exception to ruling on offer of proof appears at p. 56, 57.

[Tr. 82] MR. REILLY: ....This petition started out, it started first with their petition. They sought to vacate and they came into Court with a petition that doesn't state any grounds. My motion to dismiss on that has already been refused. I filed an application to request to admit,

that's been denied, there's no provision for it. So what the facts were, I can't get into evidence from a request to admit or by agreement. I want to put on Mr. Wilson to show, what the facts were before the arbitrators. I think I need it. I think I need it in the constitutional sense, I think I [Tr. 83] need it in due process sense under the fourteenth amendment, the fifth amendment, or the Constitution of the United States and I think I need it under the Constitution of Connecticut. Those are grounds for having those things in this case. Mr. Wilson is entitled to as much fair consideration as the insurance company is. They have established new law in this State, that allows both sides to have constitutional review. And if they are going to come into Court and seek constitutional review without a record, without a transcript, without a

showing to this Court as to what the arbitrators had before them, then their going to argue well, there's nothing in the record that says the arbitrators in this case, found something as to the loading, or didn't find something as to the loading, and they expect to prevail on that issue without my having an opportunity to be heard, my client's constitutional rights are being stepped on, and those are grounds that I would offer to the Court in support of my earlier exceptions. Those things have got to come in. ....

SUPREME COURT OF THE STATE OF CONNECTICUT
NO. 13618

SECURITY INSURANCE CO. V. JAMES WILSON
FEBRUARY 8, 1990

MOTION FOR REARGUMENT AND RECONSIDERATION

The defendant Wilson in the above matter moves for reargument and reconsideration for consideration of the issues as follows:

Did the decision violate James Wilson's rights under the Contract Clause and to due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sec. 10 of the Constitution of Connecticut by A) failing to decide issues presented on appeal, B) by failure to conduct review de novo based upon the full record of proceedings in arbitration over objection, C) by rendering decision without rational basis, and D) by assump-

tion of the fact-finding powers of the arbitrators.

History. Dispute concerning Uninsured Motorist Coverage including coverage issues submitted to arbitration. Award to plaintiff. Motion to vacate filed by insurance carrier, which motion was followed by a Motion to Correct by insured. Trial before Judge Meadow. Insurance Company appealed, followed by Wilson's cross appeal in the action entitled "Security v. Wilson" (the issues thereon not discussed in the Opinion), and followed by Wilson's appeal from decision on Motion to Correct filed in the separate action "Wilson v. Security".

Facts Relied Upon.

a) The issues raised by the Cross Appeal in the action Security v. Wilson were not decided on the record. Wilson had moved to dismiss the Motion to Vacate

on the grounds briefed in this court. The Motion to Vacate set forth no grounds, for example: it did not identify a stacking issue. It was constitutionally defective. (Record p. 6) Motion to Dismiss was a timely objection without waiver.

b) The facts presented to the arbitrators are presumed to have supported their decision. The proceedings constituting judicial review were conducted in total disregard of the scope of the fact finding powers of the arbitrators conferred by the legislature. The issue was briefed and duly preserved for decision. No record of proceedings before the Arbitration was produced by the Insurance Company. No evidence was permitted to be offered by Wilson in the trial court as to the content of the proceedings in arbitration. Absent proper Motion to Va-

cate and absent proper proof essential to constitutional review, the issues decided in the appeal from the decision in Security v. Wilson should never have been reached.

The decision finds as a fact that at a charge of $3.00 or $5.00 per vehicle for Underinsured Motorist coverage issued pursuant to regulations of the State of Connecticut would not produce a reasonable expectation by either party to the contract that stacking would result. Evidence of the true and real expectations of the parties is ruled to be inherently immaterial because the court never saw the record. Wilson claimed that this court cannot review fact-finding by arbitrators without proof of the proceedings in arbitration. These issues duly raised and fully briefed were totally omitted from the decision. The unproven infer-

ence drawn by the court's decision is that the premium charge would not bear the projected risk or that the insurance company would sustain an unreasonable loss. If this were true, the insurance company would have the ability to produce proof to substantiate its claim. The place to produce proof is in arbitration. If the insurance company did not offer proof, the inference to be drawn is that such proof, if offered would not have been favorable. Secondino v. New Haven Gas Co., 147 Conn. 642. The record does not disclose that the arbitrators made an unreasonable finding based upon evidence before them, nor that any offers of sworn actuarial proof were rejected or disbelieved. The calculations used by the court do not reflect the amount of premium receipts, expenses, amount of reserves, nor profits [or loss] ratios.

The Court had in this case only one policy. The Cohn policy was not shown to have been in evidence at arbitration in the Wilson case. In the Cohn case, the court had before it, a single schedule of premiums. The court did not have any proof of the industry practices in either case. The court did not have before it any proof of the internal legal advise given to any insurance carrier as to the invalidity of "other insurance" clauses issued for the purpose of guiding the actuarial experts who set prices for premiums.

The basis for actuarial computations of anticipated profit or loss requires more than a look at the declarations page in a single policy. (See opinion of Shea, J. dissenting, Nationwidev. Gode, 187 Conn. 386 at 403.) Statisticians need to know the number of vehicles to be insured, the

history of losses. It is common knowledge that premium costs as a percentage of limits will decrease. The higher the limit, the lower the premium ratio. Without proof, without a record, there is no rational basis for concluding that coverage was excessive based upon the declarations sheet of any policy. The attempt to do so is ludicrous and lacks credibility.

From 1967 until the date of this decision, insurance companies knew that "Other Insurance" clauses were not authorized by the regulations. They were entitled to review the premium charges according to risk assumed. Reasonable expectations is a question of fact. This fact is determined by the Supreme Court based upon premium charges by a company that charges but does not prove, that premium it elected to charge was insufficient.

The Supreme Court does not have this fact-finding authority. Styles v. Tyler, 64 Conn. 432.

After Pecker, from 1976 forward all insurance companies knew UM "other insurance" exclusions were illegal. All parties to every such contract were charged with knowledge of that decision.

No declaratory judgment action was ever brought in regard to the fleet coverage issue. No amendment to the regulations to allow "Other Insurance" clauses for business policies were adopted. It is now 1990 and insurance companies have collected premiums for uninsured motorist coverage throughout this period. No court or fact-finding commission has determined whether premiums charged have been adequate or inadequate for the risks assumed, with or without stacking for the purposes of the record in this case.

Had the insurance carrier shown that it offered evidence in the proceedings below from actuarial experts, sworn testimony was or would have been subject to cross-examination and scrutiny. Evidence was or would have been available for fact-finding purposes. No record was produced for review. There was no proof that the insurance carrier had not pre-calculated and charged for the risk. There was no proof that the industry was not intending to charge for this risk. There was no proof of premium charges by other companies at any time in the period affected by the judgment.

The legislature has delegated the authority to regulate the insurance industry to the office of the Insurance Commissioner. At no time has this office promulgated a regulation that exempted automobile insurance policies sold to

businesses from any regulation. No regulation was adopted which authorized "other insurance" clauses for a business policy. The legislature has not enacted any law which would authorize the inclusion of an anti-stacking clause in any automobile policy.

The decision pre-assumes, without proof that insurance companies and businesses do not intend to contract for Uninsured Motorist Coverage with stacking, under Connecticut regulations, under the same policy terms as are found in family automobile policies. The decision departs from prior decisions which showed examination of the policy language and departs from prior cases which gave effect to the scheme of the statutory-regulatory language, and further, departs from the concept of review of the arbitration record. The court is wholly unaware of the exis-

tence or non-existence of other facts which would or could have reasonably affected the beliefs of the parties to the contract. Review of the record before the arbitrators was prohibited.

The judiciary cannot sit as a super legislature. Blue Sky Bar, Inc. v. Stratford, 203 Conn. 14, 27. New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed. 2d 511.The insurance companies have been free to set their premiums based upon the expectation of stacking and simultaneously to issue propaganda without proof. This is contrary to Wilson's rights. There is invasion of the rights of tne legislature.

> "If a statutory scheme is clearly comprehensible and can be applied, we will apply it although it may mandate a result which appears illogical. If the enactment be constitutional, its wisdom is not for this court to determine. Cyphers v. Allyn, 142 Conn. 669, 705, 118 A.2d 318 (1955); Brunswick Corporationv. Liquor Control Commission, 184 Conn. 75, at 81.

The invasion of legislative power is two-fold. Not only does the legislative power to determine the desirability of fleet stacking rest with the General Assembly, and the Insurance Commissioner under the power delegated to the commissioner, but, the legislature placed primary jurisdiction to determine the issues of coverage in arbitration, when insurance companies included arbitration clauses. Thereupon the power to find facts and to take evidence was placed with arbitrators. This court, over objection, in the appeal taken by the insurance carrier heard in 1986, said (199 Conn. 618) that this insurance company had used a "restricted" arbitration clause, and that the court could review any decision later to be made in arbitration. The purpose was to assure due process of law and to guarantee that parties

compelled to submit to arbitration would not be subject to binding arbitrary and unreasonable awards not justified by evidence and the public policy as found in the statutes and regulations.

James Wilson has been deprived of his contract rights to have facts found by arbitrators and deprived of due process of law by the standard of review applied in this case. The effort to prevent binding arbitration awards viewed as arbitrary and unreasonable should not be directed toward a process of review which produces a decision that

> 1) is not based upon the evidence presented in arbitration nor rulings of the arbitrators resulting therefrom, and/or
> 2) is based upon a fact-finding proclamation not founded upon constitutional, legislative or regulatory declaration and without any adequate investigative or fact-finding process,

otherwise, the power to determine the controversy between the parties in unrea-

sonable manner not intended by the legislature has been merely transferred, in violation contract rights and of of the rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sec. 10 of the Constitution of Connecticut.

As a demonstration to illustrate the inadequate calculations set forth in the opinion, this lawyer knows of an instance where Lloyds of London sold liability coverage for One Dollar for coverage <u>without limit</u> applicable in a vehicular personal injury action settled for $50,000.00. The insurance company's total exposure was infinity. The premium charge was the usual and customary The court in its opinion has drawn an unfair and unreasonable conclusion based upon the agreement re damages and six vehicle

stacking between the parties. Said conclusion drawn to support the finding of fact. The court could equally have concluded that the insurance carrier was seeking to cut its losses, and had similar intent when the insurance carrier settled the claim of Officer Pepe while Officer Pepe's appeal was before this court in 1986 as a companion case to that of Wilson and thereafter prevented disclosure of the terms of the Pepe settlement. It is unreasonable for the reason that Wilson had disclosed in arbitration that he had personal uninsured motorist coverage in the amount of $80,000, which was reduced to $25,000. by the worker's compensation offset. Both carriers have overlapped the deduction. This carrier admitted Wilson's damages were $350,000. The 25,000., the Workers Compensation and the $240,000. substantially compensate

Wilson almost in full, if paid. The court was told that Wilson was being reasonable. The statement was true. Instead, without the record of the arbitrators hearing, the court has attempted to justify its findings. The court does not know who proposed the agreement or why. Wilson could not know that the insurance carrier would attempt to proceed in this court without a record, and the inner thinking of this court on such matters would not be anticipated by outsiders.

Legal Authority

P.B. §4122, Styles v. Tyler, 64 Conn. 432. Secondino v. New Haven Gas Co., 147 Conn. 642, Contract Clause and Fifth and Fourteenth Amendments to the Constitution of the United States, Article I, Sec. 10 of the Constitution of Connecticut, Blue Sky Bar, Inc. v. Stratford, 203 Conn. 14, 27. New Orleans v. Dukes, 427 U.S. 297,

96 S.Ct. 2513, 49 L.Ed. 2d 511; Cyphers v. Allyn, 142 Conn. 669, 705, 118 A.2d 318 (1955); Brunswick Corporation v. Liquor Control Commission, 184 Conn. 75, at 81.

Respectfully submitted
The Defendant
James Wilson

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Exerpts from Wilsons preliminary statement of issues filed with Connecticut Supreme Court:

STATEMENT OF ISSUES ON CROSS APPEAL
and
COUNTER STATEMENT OF ISSUES ON APPEAL

Part I:

Statement of Issues on Cross Appeal

Did the Trial Court err in denying defendant's motion to dismiss the Application to Vacate Arbitration Award for total failure of the plaintiff to give notice of the basis for or limits to the legal issues intended to be adjudicated at the time the Motion to Vacate was filed and within the time for filing a Motion to Vacate, and in allowing amendment at later date.

Part II: Counter Statement of Issues on Appeal.

1. Did the plaintiff properly raise any

issues by a petition which defectively failed to state any grounds for the relief sought in that it alleged no facts to support the allegation that the arbitrators' award was based upon an erroneous interpretation of Connecticut law and therefore exceeded the arbitrators' powers and which did not allege that plaintiff sought a full review de novo.

2. Did the plaintiff properly raise the issues set forth in its statement of issues by presenting only evidence of arbitrator's decision and the policy, which was a standard form contract of adhesion containing Uninsured Motorist coverage provisions apparently written for the standard family automobile policy and by affirmatively inducing the Trial Court to sustain objection to the presentation of further evidence offered by the defendant.

3. Did the plaintiff abandon the remedy of review de novo.

6. Did the plaintiff waive its claims by presenting no evidence of actuarial nature for consideration by the courts with respect to the effect of double premiums.

7. Did the plaintiff waive its claims tnat the standard interpretation to be given standard insurance policies written in Connecticut was inapplicable in this instance by failing to show that the arbitrators had proof that the parties had an actual meeting of the minds to contrary effect when agreeing to terms.

8.. Did the plaintiff waive its claims in respect to stacking by failing to prove the state of the evidence before the arbitrators with respect to the actual meeting of minds of the parties to the contract.

11. Is the plaintiff estopped from seek-

ing review under the pretext of preserving its constitutional rights after causing a limit upon full hearing in the trial court resulting from objections to evidence that would have permitted a showing that full and fair hearing was granted by the arbitrators, by failing to voluntarily agree or respond to requests to admit which pertained to the proceedings before the arbitrators, and by failing to voluntarily provide to the court below its concessions as to what was presented to the arbitrators, and particularly after having failed to provide in its policy terms and conditions which applied after arbitration to the review process, and in failing to provide a transcript of the arbitration proceedings.

13. What is the standard of review when the insurance carrier does not pray for review de novo, and makes claim that de-

fendant insured is not entitled to a rehearing of the facts, and has no right to present proof of the content of the evidence before the arbitrators and no right to show that the undisputed, uncontroverted proof supported the decision of the arbitrators, and instead seeks to impose arbitrary limits upon the scope of review sought.

14. Did plaintiff fail to prove its case by failing to present evidence of the proceedings before the arbitrators.

15. Would a decision for the plaintiff on the theory of case presented by plaintiff have denied defendant a fair trial and denied due process of law as required by State and United States Constitutions.

Superior Court, New Haven

Filed August 29, 1988

MOTION TO DISMISS and OBJECTION TO MOTION TO VACATE

The defendant hereby gives notice he objects to the Motion to Vacate and submits for the consideration of this Court that:

1. The motion fails to set forth the purported grounds for its motion to vacate nor define such claims of law which the plaintiff desires to raise and within the time limited by law.
2. The motion does not apprise the defendant nor the court of the errors which the plaintiff intends to assert, and in such manner the defendant's rights to due process of law under the State and Federal Constitutions are denied.

The defendant further asserts that by

failing to allege and assert specific grounds for seeking to vacate the award of the arbitrators, the defendant has waived and abandoned the grounds not pleaded or asserted in its motion.

Wherefore, the defendant moves the Motion to Vacate filed by plaintiff be dismissed.

The Defendant

BY: DAVID M. REILLY

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Certificate of Service

I, Peter B. Reilly, do hereby certify that the foregoing Petition for Certiorari together with the Appendix thereto was duly deposited in the United States Mail, postage prepaid, addressed to:

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Peter B. Reilly
Attorney.